GUIDELINES AND BEST PRACTICES

IMPLEMENTING 2018 AMENDMENTS TO

RULE 23 CLASS ACTION SETTLEMENT PROVISIONS

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

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Expected Relief

BEST PRACTICE 3A*:* Parties should provide information to the court showing that the expected relief of the proposed settlement to class members is adequate.

Information comparing the relief provided by the settlement to the relief that class members could potentially recover in litigation is one of the most important core concerns that a court must consider in determining whether the proposed settlement is fair, reasonable, and adequate.

To comply with amended Rule 23(e)(2)(C), the parties should provide information explaining the value of the relief made available to class members, including injunctive and other nonmonetary relief when that value is not apparent from the plain terms of the settlement. In recent lender-placed insurance litigation, for example, class-wide settlements offered class members a percentage of the total amounts they had been overcharged for home owners' insurance. While the percentages may have seemed facially low — class members who submitted claims stood to recover 8 to 12.5 percent of the total amounts charged them — class members were in fact recovering almost all of the total *over*charge to their specific accounts. Class counsel provided this context to the courts in their own declarations and motions for approval, and the courts ultimately

found that the relief afforded to the class was "extraordinary,"[1] noting that when the injunctive relief provided by the settlements was also considered, the settlements offered class members more than they likely would have ever received at trial, when each class member would be required to provide substantial evidence and proof beyond what the approved claims process required.[2] Amended Rule 23(e)(2)(C) lists four discrete subtopics that the court should consider in assessing the adequacy of the expected relief to the class members.

The court will consider the same information when it is deciding whether to approve the settlement at a later date under Rule 23(e)(2).

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> BEST PRACTICE 3A(ii): The parties should provide information on the effectiveness of the proposed method of distributing relief to class members in assessing whether relief provided for the class is adequate.

The parties should describe the proposed plan for equitably and reasonably distributing the settlement funds to class members. The parties should advise the court whether the defendant will pay settlement benefits directly to all class members or require submission of a claim as a condition of recovery. If the benefits are distributed in a "claims-made" settlement, the parties should explain the contemplated claims process and the proposed notice and claims methods to ensure the best practicable recovery by the class. At the notice stage, the parties should provide information showing that any proposed claims-processing method will facilitate the filing of legitimate claims

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[1] *Braynen v. Nationstar Mortg*., LLC, No. 14-CV-20726-GOODMAN, 2015 WL 6872519, at *4 (S.D. Fla. Nov. 9, 2015) ("[O]ne district court touted settlements like this — that provide near-complete relief to class members on a claims-made basis — as extraordinary . . . .") (referencing *Arnett v. Bank of Am*., N.A., No. 3:11-cv-1372-SI, 2014 WL 4672458 (D. Or. Sept. 18, 2014)).

[2] *See, e.g.*, *Almanzar v. Select Portfolio Servicing, Inc.*, No. 1:14-CV-22586-FAM, 2016 WL 1169198, at *3 (S.D. Fla. Mar. 25, 2016) ("Factoring in the injunctive relief . . . the settlement very likely exceeds what Plaintiffs could have won at trial.") (quoting *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 693 (S.D. Fla. 2014)).

and deter unjustified claims. At the same time, the court should ensure that the claims process is not unduly demanding, burdensome, and oppressive.

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> BEST PRACTICE 3C: In determining whether the proposed method of distributing relief is effective, a court should not assume that automatically distributing benefits to all class members is superior to distributing benefits based on submitted claims.

A class settlement may be structured to distribute benefits to all known or identifiable class members, or alternatively it may be structured to distribute benefits only to class members who submit valid claims. Neither structure is inherently superior to the other in all circumstances. A court should therefore consider each method on its own merits.

"[T]he use of a claims process is not inherently suspect."[3] In fact, a claims process may be inevitable in certain settlements, such as where a claim is necessary to identify class members. An example of this situation could be a settlement involving an over-the-counter consumer product, where class members or the details of their purchases may not be readily ascertainable from a defendant's records. But a claims process may have benefits even where its implementation is not inevitable or strictly necessary, and courts should consider factors other than necessity when reviewing a settlement's structure.

First, assuming that the overall value of a settlement is fixed and the only question is how to distribute that fixed amount of benefits, a claims process may be able to provide complete or otherwise significant relief for the subset of class members who choose to submit claims, whereas an automatic distribution would provide relief to a greater portion of the class but in much smaller amounts. This was the case in lender-placed insurance settlements, where defendants paid class members who participated in claims-made settlements near-complete monetary relief, but paid far

[3] *Poertner v. Gillette Co*., 618 F. App'x 624, 628 (11th Cir. 2015) (citation omitted).

less to members of direct-pay classes.[4] In these cases and others, although a claims-made settlement structure did not result in an award to all class members, it did maximize the *opportunity* available to each class member. This approach credits the decision made by each individual class member.[5]

Second, direct-pay settlements may distribute relief to a greater number of class members, but a court should be aware of the limitations in reach. A court should consider how accurate, current, and complete the address data is, as well as whether class members will be given the opportunity to verify the details of their claims addresses at the notice stage. The shakier the address data, the greater the risk of waste created by checks that are discarded, mistaken for junk mail, or sent to the wrong residence. Claims administrators should also consider how to reduce the risk of fraud presented by checks being sent to outdated addresses or cashed by individuals other than the class member at the same address.

Third, if class members would receive only small amounts in a direct-pay structure, the administrative costs may erode the benefits received. These costs may include the costs of printing and mailing large volumes of checks, processing returned payments, and tracking down class members whose addresses may have changed. These costs are typically lower in a claims-made structure because of the lower number of participating class members.

Fourth, if the class members have claims that vary materially in amount, using a claims process may allow the parties to tailor the amounts paid by the settlement and avoid over- or

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[4] *Compare Arnett*, 2014 WL 4672458, at *12 (direct pay settlement offering class members a net of 2.28% of premiums paid under a 25% fee award observed by court after declining a request for a 30% fee award due to a lack of "special circumstances" justifying a "departure from the benchmark fee of 25%), *with Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV-GOODMAN, 2016 WL 1529902, at *11 (S.D. Fla. Apr. 13, 2016) (claims-made settlement offering class members "near-complete" monetary relief that "very likely exceed[ed] what Plaintiffs could have recovered at trial") (citations omitted).

[5] *See, e.g.*, *Braynen*, 2015 WL 6872519, at *14 ("Negotiating for a smaller amount to go to Class Members would, in effect, unfairly reward some Class Members for their own indifference at the expense of those who would take the minimal step of returning the simple Claim Form to receive the larger amount.").

underpayment to individual class members. If, for example, a defendant's records (or lack thereof) do not allow it to ascertain how much, if anything, is due to individual consumers, a claims process allows for self-identification and the provision of detailed claim information.

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> **GUIDELINE 5:** At the final approval stage, the court should consider relief delivered to class members in determining the appropriate award of attorney's fees in accordance with Rule 23(h). In appropriate cases, a court may consider nonmonetary benefits as part of the total relief in relation to the proposed award of attorney's fees in evaluating whether the proposed settlement is fair, reasonable, and adequate.

A court awards attorney's fees in accordance with Rule 23(h). The Committee Note to Rule 23(h) sets out various factors that the court can consider in evaluating a request for attorney's fees, including: (1) work that produced a beneficial result for the class; (2) work that actually achieved a result for class members; (3) settlement provisions that provide for future payment; and (4) nonmonetary provisions that provide actual value for class members. These factors may also be adjusted based upon the accepted method for determining appropriate attorney's fees in that jurisdiction (*i.e.,* percentage of the fund, lodestar, etc.). The court should defer to the recommendations of appointed lead counsel when considering any division of attorney's fees among counsel, and it may give weight to agreements between class counsel and others about the fees claimed by the motion.

A court should consider and analyze settlements involving nonmonetary benefits for class members, according to the 2003 Committee Note accompanying Rule 23(h), to ensure that these benefits have actual value for the class, like injunctive and declaratory relief would in civil rights litigation.